

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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ME2 PRODUCTIONS, INC.,		Case No. 2:16-CV-2783 JCM (NJK)
	Plaintiff(s),	ORDER
v.		
TONIKO HIGGINS, et al.,		
	Defendant(s).	

Presently before the court is plaintiff ME2 Productions, Inc.'s motion for default judgment against defendant Toniko Higgins. (ECF No. 54).

## I. Facts

This is one of several similar cases originally filed by plaintiff against numerous unidentified Doe defendants for infringing its copyright in the film “Mechanic 2: Resurrection” by using BitTorrent software. For a more detailed explanation of the background to these cases, see *ME2 Productions, Inc. v. Bayu*, no 2:17-cv-00724-JCM-NJK, 2017 WL 5165487 (D. Nev. Nov. 7, 2017).

On November 15, 2017, the court adopted in part Magistrate Judge Koppe's report and recommendation that all but the first-named plaintiff be severed and dismissed from the case, thereby dismissing all defendants except for defendant Higgins. (ECF No. 52).

## **II. Legal Standard**

Obtaining a default judgment is a two-step process. *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986). First, “[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party’s default.” Fed. R. Civ. P. 55(a). Federal Rule of Civil Procedure

1 55(b)(2) provides that “a court may enter a default judgment after the party seeking default applies  
2 to the clerk of the court as required by subsection (a) of this rule.”

3 The choice whether to enter a default judgment lies within the discretion of the court.  
4 *Aldabe v. Aldabe*, 616 F.3d 1089, 1092 (9th Cir. 1980). In the determination of whether to grant  
5 a default judgment, the court should consider the seven factors set forth in *Eitel*: (1) the possibility  
6 of prejudice to plaintiff if default judgment is not entered; (2) the merits of the claims; (3) the  
7 sufficiency of the complaint; (4) the amount of money at stake; (5) the possibility of a dispute  
8 concerning material facts; (6) whether default was due to excusable neglect; and (7) the policy  
9 favoring a decision on the merits. 782 F.2d at 1471–72. In applying the *Eitel* factors, “the factual  
10 allegations of the complaint, except those relating to the amount of damages, will be taken as true.”  
11 *Geddes v. United Fin. Grp.*, 559 F.2d 557, 560 (9th Cir. 1977); *see also* Fed. R. Civ. P. 8(d).

### 12 III. Discussion

13 Plaintiff requests the court enter default judgment against defendant as follows: \$15,000 in  
14 statutory damages; a permanent injunction against defendant; and attorney’s fees and costs in the  
15 amount of \$7,117.50. (ECF No. 37).

16 On July 13, 2017, plaintiff filed a motion for entry of clerk’s default as to defendant Higgins  
17 (ECF No. 51), and on November 15, 2017, the clerk entered default, (ECF No. 53). Therefore,  
18 plaintiff has satisfied subsection (a) of Federal Rule of Civil Procedure 55.

19 The first *Eitel* factor weighs in favor of default judgment in this case. Defendant has failed  
20 to respond or appear in the case, which prejudices plaintiff’s ability to pursue its claims on the  
21 merits and seek recovery of damages. *See PepsiCo, Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d 1172,  
22 1177 (C.D. Cal 2002) (“Potential prejudice to Plaintiffs favors granting a default judgment. If  
23 Plaintiffs’ motion for default judgment is not granted, Plaintiffs will likely be without other  
24 recourse for recovery.”).

25 The second and third *Eitel* factors favor plaintiff in this case. Plaintiff’s complaint  
26 adequately alleges plaintiff’s copyright infringement claims. *See Eitel*, 782 F.2d at 1471.

27 The fourth *Eitel* factor, which compares the amount of money at stake to the seriousness  
28 of defendant’s conduct, supports a default judgment in favor of plaintiff. “If the sum of money at

1 issue is reasonably proportionate to the harm caused by the defendant's actions, then default  
2 judgment is warranted." *Landstar Ranger, Inc. v. Parth Enter., Inc.*, 725 F. Supp. 2d 916, 921  
3 (N.D. Cal. 2010).

4 For statutory damages, plaintiff requests \$15,000 under 17 U.S.C. § 504(c). The statute  
5 sets a \$750 minimum and \$30,000 maximum award for damages in copyright infringement cases.  
6 17 U.S.C. § 504(c)(1). The maximum increases to \$150,000 when the infringement was willful.  
7 17 U.S.C. § 504(c)(2). Courts have "wide discretion in determining the amount of statutory  
8 damages to be awarded, constrained only by the specified maxima and minima." *Peer Int'l Corp.*  
9 *v. Pausa Records, Inc.*, 909 F.2d 1332, 1336 (9th Cir. 1990) (quoting *Harris v. Emus Records*  
10 *Corp.*, 738 F.2d 1329, 1335 (9th Cir. 1984)).

11 Given defendant's numerous opportunities to respond to plaintiff's demand letters or  
12 otherwise appear in the action, coupled with plaintiff's unopposed allegations that the court takes  
13 as true, the court holds defendant willfully infringed on plaintiff's copyright. However, similarly  
14 to another court in this district,<sup>1</sup> the court holds that an award of \$15,000 would severely  
15 overcompensate plaintiff and unduly punish defendant for the conduct at issue here. The court  
16 will exercise its discretion and award statutory damages in the amount of \$1,500. See *Peer*, 909  
17 F.2d at 1336. This award will adequately protect plaintiff's copyrights without constituting  
18 excessive punishment. See *LHF Productions, Inc. v. Buenafe*, no. 2:16-cv-01804-JAD-NJK, 2017  
19 WL 4797523, at \*4 (D. Nev. Oct. 24, 2017).

20 The Copyright Act allows courts to award the recovery of full costs and reasonable  
21 attorney's fees to the prevailing party. 17 U.S.C. § 505. Plaintiff moves for \$6,637.50<sup>2</sup> in  
22 attorney's fees and \$480 in costs, for a total of \$7,117.50.

23 Therefore, the total sum of money at stake is \$8,617.50. Thus, the fourth factor favors an  
24 entry of default judgment in that total amount. See *Eitel*, 782 F.2d at 1471.

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26 <sup>1</sup> In *LHF Productions, Inc. v. Buenafe*, no. 2:16-cv-01804-JAD-NJK, 2017 WL 4797523  
27 (D. Nev. Oct. 24, 2017), Judge Dorsey awarded plaintiff \$1,500 in statutory damages on a legally  
identical fact pattern.

28 <sup>2</sup> Plaintiff used a lodestar calculation of \$375 an hour multiplied by 17.7 hours reasonably  
spent litigating this case, which equals \$6,637.50.

1           The fifth *Eitel* factor, the possibility of a dispute concerning material facts, favors plaintiff.  
2 Here, there is no dispute concerning the material facts of the case. Plaintiff has adequately pleaded  
3 copyright infringement claims. Further, “[o]nce the clerk enters a default, the well-pleaded factual  
4 allegations of the complaint are taken as true, except for those allegations relating to damages.”  
5 *O’Brien v. United States of America*, no 2:07-cv-00986-GMN-GWF, 2010 WL 3636171, at \*1 (D.  
6 Nev. Sept. 9, 2010). Therefore, the court must accept all well-pleaded factual allegations in  
7 plaintiff’s complaint as true. Considering the well-pleaded factual allegations, there are no  
8 disputes of material fact regarding defendant’s infringing conduct. Accordingly, the fifth *Eitel*  
9 factor favors plaintiff. *See Eitel*, 782 F.2d at 1471–72.

10          The sixth *Eitel* factor considers excusable neglect. 782 F.2d at 1472. The factor favors  
11 entry of default judgment when the defendant has been properly served or plaintiff shows that  
12 defendant is aware of the lawsuit and failed to answer. *Meadows v. Dominican Republic*, 817 F.2d  
13 517, 521 (9th Cir. 1987). Here, plaintiff properly served defendant, who has failed to answer or  
14 otherwise appear. Accordingly, the court holds that plaintiff has demonstrated defendant’s failure  
15 to appear is not the result of excusable neglect. *See id.* The sixth *Eitel* factor favors default  
16 judgment in this case. *See Eitel*, 782 F.2d at 1472.

17          The seventh *Eitel* factor considers the strong policy favoring case disposition on the merits.  
18 *Id.* While public policy generally favors disposition on the merits, default judgment is proper  
19 when a defendant deliberately chooses not to defend the case. *PepsiCo, Inc.*, 238 F. Supp. 2d at  
20 1177. Defendant’s conduct in this case has made it impractical, if not impossible, to adjudicate  
21 this case on the merits. Accordingly, default judgment is appropriate. *See Eitel*, 782 F.2d at 1472;  
22 *PepsiCo, Inc.*, 238 F. Supp. 2d at 1177.

23          After considering the foregoing, the court finds good cause to grant plaintiff’s motion for  
24 default judgment. Moreover, plaintiff has properly complied with Rule 55. Therefore, the court  
25 will grant plaintiff’s motion for default judgment.

26          Plaintiff requests a permanent injunction against defendant “enjoining [her] from directly  
27 or indirectly infringing Plaintiff’s rights as to the Plaintiff’s motion picture, including without  
28

1 limitation using the Internet to reproduce, to distribute, to copy, or to publish the motion picture.”  
2 (ECF No. 54 at 13).

3 The Copyright Act allows courts to “grant temporary and final injunctions on such terms  
4 as it may deem reasonable to prevent or restrain infringement of a copyright.” 17 U.S.C. § 502(a).  
5 The Supreme Court held in *eBay Inc. v. MercExchange, L.L.C.* that a plaintiff must satisfy a four-  
6 factor test to receive a permanent injunction in a patent-infringement case. 547 U.S. 388, 391  
7 (2006). Plaintiff must demonstrate: “(1) that it has suffered an irreparable injury; (2) that remedies  
8 available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that,  
9 considering the balance of hardships between the plaintiff and defendant, a remedy in equity is  
10 warranted; and (4) that the public interest would not be disserved by a permanent injunction.” *Id.*  
11 This test also applies to copyright-infringement cases. *Flexible Lifeline Systems, Inc. v. Precision*  
12 *Lift, Inc.*, 654 F.3d 989, 995–96 (9th Cir. 2011).

13 Plaintiff argues that “[m]onetary damages alone are simply inadequate” because “absent  
14 injunctive relief to force the deletion of each torrent file from the Defendant’s computers ...  
15 infringement will continue unabated in exponential fashion.” (ECF No. 54 at 11). The court holds  
16 that the monetary judgment in this case is sufficient to compensate plaintiff for any infringement  
17 injury and likely to sufficiently deter defendant from infringing plaintiff’s copyright, so plaintiff  
18 fails to satisfy the second factor of the permanent-injunction test. *See MercExchange*, 547 U.S. at  
19 391. Accordingly, the court will deny plaintiff’s request for injunctive relief.

20 **IV. Conclusion**

21 Accordingly,

22 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that plaintiff’s motion for  
23 default judgment (ECF No. 54) be, and the same hereby is, GRANTED in part and DENIED in  
24 part, consistent with the foregoing.

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IT IS FURTHER ORDERED that plaintiff shall prepare and file an appropriate judgment for the court's signature consistent with the foregoing within twenty-one (21) days of the entry of this order.

4 DATED March 28, 2018.

Xem C. Mahan  
UNITED STATES DISTRICT JUDGE